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Attorney Docket No. 65678-0011

REMARKS

I. INTRODUCTION

Claims 1-21 are currently pending. No claims have been canceled or amended in this response.

In the Office Action: (1) claims 1-7 and 10-21 were rejected under 35 U.S.C. 103(a) as being obvious over U.S. Patent No. 6,014,644 ("Erickson") in view of U.S. Patent No. 5,744,873 ("Berent"); and (2) claims 8-9 were rejected under 35 U.S.C. 103(a) as being obvious over Erickson in view of Berent, and further in view of U.S. Patent No. 6,161,099 ("Harrington").

Applicant respectfully traverses Examiner's rejections and submits that all pending claims are in condition for allowance. Alternatively, applicant respectfully requests that the Office withdraw the finality of the Office Action and reopen prosecution of the present application. With regard to the Section 103 rejections, the cited references do not disclose each and every element of the claimed invention. Moreover, the cited references do not affirmatively suggest their combination.

II. THE IMPROPER FINALITY OF THE OFFICE ACTION

In the event the examiner is unpersuaded by the arguments below that all pending claims are in allowable condition, applicants respectfully request that the Office withdraw the finality of the Office Action and reopen prosecution of the present application.

Applicants advance two independent reasons why the Office Action was improperly made final: (1) the examiner did not respond at all to a number of applicant's arguments traversing the examiner's rejections and therefore there are issues between the examiner and the applicant that are not ripe for appeal, and (2) the examiner's rejections of the claims, as currently stated, are not sufficiently detailed so as to make the issues between the examiner and the applicant sufficiently developed for appeal.

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A. THE EXAMINER'S FAILURE TO RESPOND TO ALL OF APPLICANTS' ARGUMENTS

There can be no debate that the examiner has a clear duty to specifically respond to each of applicant's arguments, and that the examiner must do so before an action can properly be made final. Section 706.07 of the MPEP clearly states that

Before final rejection is in order a clear issue should be developed between the examiner and applicant. . . . The examiner should never lose sight of the fact that in every case the applicant is entitled to a full and fair hearing, and that a clear issue between applicant and examiner should be developed, if possible, before appeal.

Moreover, Section 706.07 states that the final rejection "should include a rebuttal of any arguments raised in the applicant's reply" to the examiner's last rejections. Similarly, MPEP 707.07(f) states that "[w]here the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it."

In the Remarks filed June 26, 2003 applicants made a number of arguments to which the examiner wholly failed to respond. These arguments include but are not limited to the following:

- It would not have been obvious to one skilled in the art to modify the teachings of Erickson to include purchase, rental, and lease transaction parameters in a bid definition (page 13).
- Berent's individual user access privileges to a network do not amount to a definition of classes of users allowed to place a bid on an asset. (Page 16.)
- Erickson teaches away from a combination with Berent (page 17).
- Harrington and Erickson cannot be combined because the references teach away from each other (page 19).

As is clear from these instances, the record contains issues inadequately developed for appeal because the examiner has left the record silent regarding the examiner's position and reasoning with respect to a number of issues material to the rejection of applicant's claims. Moreover, the examiner has not provided motivation statements for any obviousness rejections, as discussed in detail below. Because of these omissions, applicants cannot determine what arguments are necessary or appropriate to traverse the rejections. Applicants submit that these holes in the record leave issues that are

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inadequately developed for appeal. Therefore, applicants respectfully submit that finality in this case was premature, and prosecution should be reopened.

B. THE "OMNIBUS" REJECTION OF CLAIMS 1-7 and 10-21

The examiner rejected claims 1-7 and 10-21 under 35 U.S.C. 103(a) as being obvious over Erickson in view of Berent. However, the examiner did not specifically identify the claims and limitations to which cited portions of the prior art was being applied. Instead, the Office Action on pages 5-6 provides a list of disclosures without identifying the claim limitations on which the examiner believes each of these disclosures reads. The listed disclosures do not all match limitations in applicant's claims, and the examiner has therefore left it to applicant to determine, and in some cases, depending on how closely the a given element appears to match a given claim limitation, guess which claim limitation is being rejected by the listing of a given disclosure.

Further, it appears that the examiner intended many of the listed disclosures to be combined with disclosure from Berent or the examiner's taking of Official Notice. However, because of the examiner's failure to identify specific claims, much less specific claim limitations, to which the prior art of record is being applied, it is impossible for applicant to determine what the Office believes to be the basis for an obviousness rejection of each claim. In particular, the examiner has not adequately explained what combination of elements from each cited reference would have rendered each recited claim limitation obvious. Moreover, as discussed in detail below, the examiner failed to meet the burden of a *prima facie* case of obviousness, because the examiner failed to state a motivation for one of ordinary skill in the art to have combined the cited references.

Accordingly, applicant respectfully submits that for this second, independent reason, finality in this case was premature, and prosecution should be reopened.

III. CLAIM REJECTIONS USING ERICKSON AND BERENT

In the Office Action, claims 1-7 and 10-21 were rejected under 35 U.S.C. 103(a) as being obvious over U.S. Patent No. 6,014,644 ("Erickson") in view of U.S. Patent No. 5,744,873 ("Berent"). However, Erickson and Berent do not disclose each and every

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element of the claimed invention. Moreover, there is no affirmative suggestion to combine the cited references, and the cited references teach away from applicants' claims. Applicants respectfully traverse the rejections and, therefore, assert that claims 1-7 and 10-21 are in condition for allowance.

A. Erickson and Berent do not disclose each and every element of claims 1-7 and 10-21.

In the Remarks filed June 26, 2003, ("prior Remarks") applicants argued that Erickson and Berent do not disclose each and every element of claims 1-7 and 10-21 with respect to six different elements of the claims. Applicants maintain all of these arguments in the present response, and address the examiner's responses to each of them in turn.

1. The cited art fails to disclose a "bid definition defining parameters associated with one of a purchase, rental and lease transaction of said asset."

The cited prior art lacks any citation of a bid definition defining parameters associated with one of purchase, rental and lease transaction of said asset, as required by claim 1.

a. Lack of a prima facie case of obviousness

The examiner concedes on page 3 of the Office Action that Erickson does not teach a "bid definition defining parameters associated with one of a purchase . . ." by stating disagreement with applicants' purported contention that "it would not be obvious to modify Erickson to encompass purchases, rental and lease transactions." The examiner asserts on page 3 of the Office action that because "Erickson discloses purchasers . . ., the prior art reads on this limitation." Applicants respectfully point out that claim 1 recites "parameters associated with one of a purchase . . .", not "parameters associated with one of a purchasers . . .". Further, the portion of Erickson cited by the examiner discloses no more than that purchasers and buyers face various tasks in completing transactions. (Erickson, column 1, lines 39-40.) Neither this portion of

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Erickson nor any other reference of record says anything about a *bid definition defining parameters associated with one of a purchase, rental and lease transaction of said asset.*

Further, the examiner has stated no motivation for one of ordinary skill in the art to have modified Erickson. The examiner asserts on page 3 that

to one of ordinary skill, purchases represent just one of a plurality of transactional methods for obtaining goods and services. Others are trade, rent, time-share or leasing. Hence it would have been obvious to one of ordinary skill in the art to use parameters that [are] associated with buying, trading, rent[ing]... etc.

First, it appears that the examiner is taking Official Notice as to what one of ordinary skill in the art would have viewed as equivalent to, or in the same category as, a purchase. To the extent that the Examiner is taking Official Notice by not providing an actual teaching, applicants respectfully request a supporting affidavit or an appropriate reference in the context of claimed invention if the Examiner is going to maintain the rejection pursuant to 37 CFR 1.104(d)(2) and MPEP § 2144.04. As the Federal Circuit decision in *In re Sang Su Lee*, 2002 U.S. App. LEXIS 855 (Fed. Cir. January 18, 2002) makes clear, each and every element of applicants' claims must be supported by a prior art citation in order to reject applicants' claims.

Second, the examiner has not met the burden of a *prima facie* case of obviousness because the Office Action simply fails to state a motivation for one of ordinary skill in the art to have implemented the step that the examiner asserts would have been obvious ("to use parameters that [are] associated with buying, trading, rent... etc."). Assuming *arguendo* that Erickson does teach a purchase as recited in claim 1, the examiner has not met the burden of making a *prima facie* case of obviousness because the examiner has not provided a motivation for one of ordinary skill in the art to have combined Erickson and Berent. As stated in Section 2143 of the MPEP:

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations.

The examiner has not provided the required suggestion or motivation to combine reference teachings. Nor do the cited references provide the required motivation.

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Further, the examiner did not respond to applicants' argument in the prior Remarks (page 13, lines 6-9) that "it would not have been obvious to one skilled in the art to modify the teachings of Erickson to include purchase, rental, and lease transaction parameters in a bid definition because such a modification to Erickson would render the Erickson functionality unsatisfactory for its primary intended purpose, the purpose of tracking communications in a reverse bidding process."

b. Support for patentability of applicants' claims in legal authority cited in the Office Action

The examiner asserts in paragraph 2 on page 3 that

this data, i.e., data associated with a rental transaction, is non-functional, as the claim[14] does not define a structural relationship between the system and the description of the data. If "rental" is replaced with "trade" for example, the claimed system performs the same way.

The examiner is apparently asserting that "non-functional" subject matter is not patentable, and for support of this proposition evidently relies on two cases cited in paragraph 3 of page 3 of the Office Action. Significantly, in both cases, the Federal Circuit held that the subject matter in question was to be given patentable weight, and reversed rejections made under 35 U.S.C. § 103. *In re Gulack*, 703 F.2d 1381, 1382, 217 USPQ 401 (Fed. Cir. 1983); *In re Lowry*, 32 F.2d 1579, 1580, 32 USPQ,2d 1031 (Fed Cir. 1994).

Gulack was a case in which the issue was whether printed matter on a substrate should be given patentable weight, and the *Lowry* court made clear that such cases were irrelevant in situations in which information was to be processed by a computer rather than the human mind. *Lowry*, 32 F.3d at 1583 (quoting *In re Bernhart*, 417 F.2d 1395, 1399, 163 USPQ 611, 615 (CCPA 1969)). Beyond establishing that the Federal Circuit has a liberal view of what subject matter qualifies as functional, *Lowry* has limited relevance to the instant application inasmuch as the claims at issue there recited a memory containing a data structure, *Lowry*, 32 F.3d at 1581, whereas the instant application recites electronic systems and a method with elements and steps employing different kinds of data.

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The *Lowry* court further explained that part of establishing a prima facie case of obviousness was that “the burden of establishing the absence of a novel, nonobvious, functional relationship rests with the PTO.” *Lowry*, 32 F.3d at 1584. Here, the Office has clearly not met the requisite burden. The examiner has simply asserted that “this data, i.e., data associated with a rental transaction, is non-functional,” without even being wholly clear as to which claim element is at issue. Whether or not the claims define “a structural relationship between the system and the description of the data” is irrelevant to the analysis of whether the recited data element has a *functional* relationship to the recited system elements or method steps. The statement that “[i]f ‘rental’ is replaced with ‘trade’, for example, the claimed system performs the same way” does not move the examiner closer to meeting the requisite burden because the Office Action fails to explain what recited claim elements are unaffected by the swap of terms that the examiner is proposing. That is, when the examiner asserts that “the claimed system performs the same way”, it is unclear to what “way”, i.e., system elements or method steps, the examiner is referring.

Further, applicants disagree with the examiner’s conclusion and assert that the kind of transaction provided by the bid module as recited in claim 1 is a functional element. Simply put, according to claim 1, the second user is provided with different kinds of transactions (purchase, rental, and lease) depending on the bid definition. That is, the system presents to the user different functionality depending on the bid definition.

Accordingly, claim 1 is in condition for allowance for the reasons stated above. Claims 2-7 and 10-13 include limitations that make them independently patentable over the prior art of record. However, they are also patentable because they depend on claim 1.

Independent claim 14 includes the element of a “bid definition defining parameters associated with a rental transaction of said asset.” With respect to the “bid definition” element, claim 14 is independently in condition for allowance for the same reasons as claim 1. Furthermore, the claims that depend on claim 14 (claims 15-17), are also in condition for allowance.

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As the cited references fail to disclose the element of a "bid definition" as claimed by applicants, the cited references cannot be said to disclose the method of "generating a bid definition defining parameters associated with a rental transaction of the asset," as required by claim 18. Claims 19-21 depend from claim 18 and are also in condition for allowance.

2. The cited references fail to disclose "maintenance history data" as claimed by applicants.

Claims 2 and 14 include "maintenance history data" as part of the "asset specification data." Method claim 18 includes the steps of "generating asset specification data with an asset include maintenance history data" and "searching the market database based on search parameters specified by a second user and displaying to the second user at least a portion of the asset specification data that includes the maintenance history data."

Citing *Gulack* and *Lowry*, the examiner asserts in paragraph 3 of page 3 of the Office Action that "'maintenance history data' is also non-functional and descriptive material will not distinguish the claimed invention from the prior art in terms of patentability." Again, the examiner has not met the burden of a *prima facie* case of obviousness because the examiner has not explained why "maintenance history data" is non-functional, *i.e.*, why the storage, retrieval, display of such data is not functionally different from storing, retrieving, and displaying other kinds of data.

The recitation of asset specification data including maintenance history data provides a claim element that is clearly functional. For example, with respect to claim 2, the recited system would have a different function if a kind of data other than maintenance history data were recited. If the asset specification data included only some other kind of data (asset color, for example) or explicitly did not include maintenance history, the system would have a different utility and thus would present a different functionality.

The examiner acknowledged on page 7 of the Office Action that Erickson does not teach maintenance history, but asserts that this element would have been obvious to one of ordinary skill in the art because Berent allegedly teaches "a motor vehicle auction

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that displays certain information about a vehicle.” In response to applicants’ argument (prior Remarks, page 11) that the list of information taught by Berent does not include maintenance history data, the examiner, without explicitly so stating, apparently has taken Official Notice that “maintenance history data comprises descriptive information, VIN [vehicle identification number], condition and grade information.” Applicants respectfully disagree that maintenance history data comprises any of the elements listed in Berent or by the examiner, and request an affidavit or other reference from the examiner supporting this assertion. (As noted above, the MPEP and prevailing case law require a prior art reference such as an affidavit for each and every rejected claim element.)

Further, even if Berent did teach the recited claim element, the examiner has failed to meet the burden of a *prima facie* case of obviousness because the Office Action fails to state a motivation to combine Erickson and Berent. The Office Action on page 7 simply asserts that because Berent allegedly teaches certain limitations of applicants’ claims, it would have been obvious to combine Erickson and Berent. As applicants’ prior Remarks make clear, it would not have been obvious to one of ordinary skill in the art to provide maintenance history data from Berent’s disclosure because such data was not readily available to Berent’s system. (Prior Remarks, page 15, quoting Background Section of the Specification.)

Accordingly, claims 2, 14, and 18 are in condition for allowance. Claims 3-7 and 10-13 depend on claim 2, claims 15-17 depend on claim 14, and claims 19-21 depend on claim 18. Therefore, claims 2-7 and 10-21 are in condition for allowance.

3. “Classes of users” are not disclosed in the cited references.

Claim 4 recites “a bidder classification parameter defining classes of users allowed to place a bid on said asset.” The examiner maintains on pages 3-4 of the Office Action that classes of users would have been obvious from Erickson because Erickson teaches classifying data and from this teaching “organizing data, using classification, whenever appropriate . . . where the name of the class is merely a matter of design choice” would have been obvious to one of ordinary skill in the art.

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Applicants respectfully point out that claim 4 does not recite naming a particular class of data, but instead recites *defining* a class of *user*. Thus, the examiner's assertion that "the name of the class is merely a matter of design choice" is irrelevant to claim 4.

The portion of Erickson cited by the examiner teaches no more than a buyer assembling and using a list of suppliers of interest, but says nothing about classifying suppliers, much less users. (Erickson, col. 8, lines 28-38.) Applicants further maintain the argument made on pages 15-16 of the prior Remarks that Erickson does not teach or suggest a bidder classification parameter defining classes of users. As applicants discussed in the prior Remarks, Erickson teaches at most classifications that separate goods and services into classes.

The portion of Berent cited by the examiner teaches, as applicants argued in the prior Remarks, that each remote user can have a certain set of specific user privileges that control each user's level of access to system resources (column 4, lines 47-52). Berent's individual user access privileges to a network do not amount to a definition of classes of users allowed to place a bid on an asset. Applicants note that the examiner did not respond to this argument in the Office Action, but merely again asserted (Office Action, page 7) that Berent teaches "bid classification parameters that define classes of users allowed to bid on an asset." As just explained Berent, like Erickson, contains no such teaching.

Further, the examiner has failed to state a *prima facie* case of obviousness because the examiner has failed to explain why one of ordinary skill in the art would have been motivated to combine Erickson and Berent. Assuming *arguendo* that Erickson and Berent together taught all the elements of claim 4, the two references together, absent a motivation to combine them, would not have rendered the claim obvious to one of ordinary skill in the art.

Thus, claim 4 is in condition for allowance for reasons additional to its dependence from other patentable claims.

4. **The cited references also fail to disclose a "dealer class" and a "member class."**

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The examiner's argument (Office Action, pages 3-4) that Erickson teaches a dealer class and a member class as recited in claim 5 is the same as that discussed above regarding the classes of users recited in claim 4: these elements would have been obvious from Erickson because Erickson teaches classifying data and from this teaching "organizing data, using classification, whenever appropriate . . . where the name of the class is merely a matter of design choice" would have been obvious to one of ordinary skill in the art.

Applicants respectfully point out that claim 5 does not recite naming a particular class of data, but instead recites *defining* classes of *user* that include member classes and dealer classes. Thus, the examiner's assertion that "the name of the class is merely a matter of design choice" is irrelevant to claim 5.

The portion of Erickson cited by the examiner teaches no more than a buyer assembling and using a list of suppliers of interest, but says nothing about classifying suppliers, much less users. (Erickson, col. 8, lines 28-38.) Applicants further maintain the argument made on pages 15-16 of the prior Remarks that Erickson does not teach or suggest a bidder classification parameter defining classes of users. As applicants discussed in the prior Remarks, Erickson teaches at most classifications that separate goods and services into classes.

Thus, claim 4 is in condition for allowance for reasons additional to its dependence from other patentable claims.

5. The cited references also fail to disclose other elements in the Applicants' dependent claims.

As applicants argued in the prior Remarks, there are many other elements in the Applicants' claims that are not disclosed in the cited references. By means of example, such omissions include but are not limited to the "bidder classification parameter" of claim 4 and "registering" users as "dealers" as claimed in claims 19-20.

The examiner asserts on page 4 of the Office Action that "Erickson teaches user registration", but the portion of Erickson cited by the examiner simply teaches suppliers submitting profile information to a database, not "submitting registration by [a] supplier

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class" as asserted by the examiner. Indeed, inasmuch as Erickson does not teach a dealer class, as discussed above, Erickson cannot teach registering users as dealers.

B. Erickson and Berent teach away from the Applicants' claims, and thus there can be no affirmative suggestion for the combination asserted by the Examiner.

Repeating the argument made in the prior Remarks, it is improper to combine references where the references teach away from their combination. In re Grasselli, 713 F.2d 731, 743, 218 USPQ 769, 779 (Fed. Cir. 1983). If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious. In re Ratti, 270 F.2d 810, 123 USPQ 349 (CCPA 1959). Erickson and Berent should not be combined because they teach away from each other, and together, they teach away from applicants' claimed invention.

Erickson teaches a method and system for broadcasting, tracking, and analyzing electronic communications that take place between suppliers and buyers during a reverse bidding process. Erickson's broadcasting feature helps buyers locate potential suppliers so that the buyers can electronically request bids from the potential suppliers. The system taught by Erickson is focused on improving communications in a reverse bidding process by storing all electronic communications, made in relation to a particular bid, in a single data object and attaching each new communication to that data object. Erickson's system becomes useful in the context of reverse bidding processes because such processes require extra steps of communications between suppliers and buyers. These additional steps of communications are unnecessary in a traditional straightforward bidding process, such as Berent's on-line motor vehicle auction and information system. Berent's straightforward auction does not employ additional steps of communication, which steps are inherent in a reverse bidding process. Indeed, combination of Erickson and Berent would change a principle of operation of Erickson's reverse bidding process by changing the type and simplifying the complexity of communications that are disclosed by Erickson. Moreover, Erickson's reverse bidding system discloses that suppliers submit bids to interested buyers. In contrast, Berent discloses a traditional

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auction where potential buyers submit bids to a supplier. For these reasons, Erickson teaches away from a combination with Berent.

The examiner did not respond to the above arguments made in the prior Remarks. The combination of Erickson and Berent was necessary for the rejection of every pending claim in the Office Action. Thus, applicants submit that the inability to combine Erickson and Berent renders every claim allowable.

IV. REJECTION OF CLAIMS 8 AND 9 USING ERICKSON, BERENT, AND HARRISON

In the Office Action claims 8-9 were rejected under 35 U.S.C. 103(a) as being obvious over U.S. Patent No. 6,014,644 ("Erickson") in view of U.S. Patent No. 5,744,873 ("Berent"), and further in view of U.S. Patent No. 6,161,099 ("Harrington"). However, Erickson, Berent, and Harrington do not disclose each and every element of the claimed invention. Moreover, there is no affirmative suggestion to combine the cited references, and the cited references teach away from combination.

A. Erickson, Berent, and Harrington do not disclose each and every element of claims 8-9.

Claims 8-9 depend from allowable claims discussed above, and are therefore, in condition for allowance for the same reasons set forth above. Claims 8-9 are in condition for allowance for additional reasons as well because the cited prior art references fail to disclose patentably distinct elements recited by claims 8-9.

In the prior Remarks applicants argued that Harrington teaches an electronic sale of municipal bonds and does not disclose a rental transaction or transaction characteristic data for a rental transaction. The examiner appears to have responded to this argument by asserting on pages 4-5 of the Office Action that Harrington does teach minimum price and list price and that these elements, along with periodic lease amount, "are also non-functional, descriptive data." To the contrary, these elements are integral to what is being recited in claims 8 and 9. For example, without a "minimum price that said second user must submit to define a valid bid," the recited system would enable users to submit bids

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with prices below what the first user was willing to accept. Thus, the minimum price element fulfills a valuable function.

Further, the examiner has failed to state a *prima facie* case of obviousness with respect to claims 8 and 9 because, assuming *arguendo* that Harrington teaches limitations recited in claims 8 and 9, the Office Action provides no motivation to combine Erickson, Berent, and Harrington. The mere fact that Harrington allegedly teaches limitations recited in claims 8 and 9 is not sufficient motivation to have extended Erickson and Berent with those limitations.

Thus, it would not have been obvious to one skilled in the art to modify Erickson to include bid definition parameters associated with a purchase, rental, or lease transaction. Likewise, it would not have been obvious to include transaction characteristic data for a rental or a lease transaction, let alone a list price for a predetermined period of time, a periodic lease amount, or a lease term. Therefore, claims 8-9 are in condition for allowance.

B. Erickson and Harrington teach away from each other and the Applicants' claims.

As discussed above and as argued in the prior Remarks, there is no affirmative suggestion to combine Erickson and Berent. For the same reasons, there is no such suggestion to combine Harrington and Erickson because the references teach away from each other, as well as from the claimed invention. Harrington teaches a process and apparatus for conducting auctions for municipal bonds over the Internet. These auctions are straightforward auctions rather than reverse bidding processes. Thus, Erickson's disclosure of a system for tracking communications in a reverse bidding process teaches away from Harrington's straightforward auction.

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V. CONCLUSION

Claims 1-21 are in condition for allowance. It is believed that any additional fees due with respect to this paper have already been identified in any transmittal accompanying this paper. However, if any additional fees are required in connection with the filing of this paper that are not identified in any accompanying transmittal, permission is given to charge account number 18-0013 in the name of Rader, Fishman and Grauer PLLC.

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